

**Office of Dispute Resolution for Acquisition**  
**Federal Aviation Administration**  
**Washington, D.C.**

---

ODRA Docket No. 98-ODRA-00098

Protest of Crown Communication, Inc.  
Under Solicitation DTFA01-98-R-16125

**DECISION ON CROWN'S REQUEST**  
**FOR SUSPENSION OF CONTRACT PERFORMANCE**

On October 1, 1998, in connection with its protest under ODRA Docket No. 98-ODRA-00098, Crown Communication, Inc. ("Crown") filed with the Office of Dispute Resolution for Acquisition ("ODRA") a request for suspension of performance of the Aeronautical Data Link ("ADL") Support Services contract ("Contract") awarded to Universal Systems & Technology Inc. ("UNITECH"). On October 5, 1998, the FAA Program Office filed its opposition to the request. The Program Office has opposed the suspension of four tasks under the Contract. At the ODRA's request, the Program Office advised on October 9, 1998, that it will voluntarily suspend all other task orders under the contract, pending the resolution of these protests. Accordingly, this decision addresses only the four task orders that are in dispute. For the reasons set forth herein, the ODRA denies the suspension requests with regard to the following four tasks:

- **Administrative Support Services** (Delivery Order No. DTFA01-98-F-ADL01 issued on September 10, 1998 in the amount of \$384,129.)
- **Controller Pilot Data Link Communications Support ("CPDLC")** (Delivery order DTFA01-98-ADL02 issued on September 10, 1998 in the amount of \$431,411)
- **Flight Information Services (FIS)/Traffic Information Services (TIS)** (Delivery order to be issued).
- **Year 2000 ("Y2K")** (Delivery order to be issued).

With regard to the above tasks, the ODRA finds that Crown has not demonstrated compelling reasons to require their suspension. The standard that the ODRA applies to determine whether compelling reasons exist to support a suspension under the Acquisition Management System ("AMS") is discussed in the Section below entitled "ODRA Standard of Review."

**CROWN'S REQUEST FOR SUSPENSION**

Crown asserts that a suspension is warranted on the basis that it also satisfies the general standards for injunctive relief. Crown argues that there is a substantial likelihood that it will prevail on the merits of its protest; and in its Request and Reply sets forth detailed facts and law supporting its position. Crown further argues that performance of the UNITECH contract has caused and will continue to cause it irreparable harm, in that UNITECH is hiring and recruiting Crown's employees, including an individual who was Crown's presenter for the CPDLC oral presentation (during the proposal evaluation phase) as well as designated for a key personnel labor category. Crown claims that these activities by UNITECH severely harm its ability to maintain its competitive posture if there is a recompetition; and that this harm can only be mitigated by a suspension of UNITECH's contract. Crown asserts that "[i]t is critical that the status quo be maintained during the protest so that Crown will be able to maintain the stability of its workforce, and effectively compete in a recompetition and perform if awarded the contract." Crown further contends that the FAA will not be harmed by a suspension and can satisfy all its immediate requirements through Crown's incumbent contract. Crown notes that "Task Order 10 dated February 17, 1998, under Crown's incumbent contract, signed by the same contracting officer, includes both CPDLC and Year 2000 work. Specifically, subtask 2 requires Crown to provide engineering analysis support for the CPDLA Project Team." Moreover, Crown contends that "Subtasks 3 of Task Order 10 covers Year 2000 work", as it requires Crown to "[f]unction as the focal point for the HNL program office on the Year 2000 (Y2K) certification activities .. [to] coordinate all Y2K activities and participate in Y2K planning meetings, prepare budget and schedule estimates, and prepare Y2K status and briefing charts.'" Crown also claims Task No. 8 of its incumbent contract covers FIS work and asserts that the FAA need for "administrative services" under Delivery Order ADL01 is not critical, and even if it was, the need could be met by Crown, which is currently performing the administrative services.

Finally, Crown argues that continued contract performance, particularly under the CPDLC Delivery Order, undermines the integrity of FAA's procurement system. Crown states that UNITECH offered positions to two valuable employees, including a Senior Program Management Analyst (who was proposed by Crown as a key person for that work). Moreover, UNITECH allegedly hired two other Crown employees, including a Senior Systems Engineer (who also was proposed by Crown as a key person for that work), and another engineer who had been working on both CPDLC and Y2K work. Crown asserts that UNITECH indicated that it intends to hire all Crown's employees. Crown argues that UNITECH should not be permitted to profit from its "misconduct", that is, hiring the incumbent's key personnel immediately after award "to meet the staffing requirements of the CPDLC delivery order," and that the ODRA should not countenance the Agency's "misconduct", that is "encouraging Unitech and pressuring Crown employees" to enter into employment relationships.

## **FAA PROGRAM OFFICE'S OPPOSITION TO CROWN'S SUSPENSION REQUEST**

The FAA Program Office ("the Program Office") filed its opposition to Crown's request for a suspension on October 5, 1998. The Program Office notes that it had already offered to suspend all but four tasks under the contract, i.e. approximately 97% of the total effort. However, the Program Office asserts that four tasks at issue are crucial because the failure to continue these tasks would "result in major disruptions to the FAA's objectives in support of its customers and mission and will result in significant delays and cost impacts to the programs." The Program Office argues that its need for the disputed four tasks outweighs the harm alleged by Crown and constitutes "compelling reasons not to suspend."

The Program Office asserts that Crown's protest is not likely to succeed on the merits and cites facts and legal principles in support of its position. The Program Office also disagrees with Crown's contention that it will suffer irreparable harm if contract performance is not stayed. The Program Office asserts that "[t]he fact that some employees are choosing to leave Crown is a situation totally outside FAA's control" and "there is simply no direct evidence that FAA directed Unitech to hire any Crown personnel." We note in that regard that allegations of bias and bad faith have generally been held to require the presentation of "well nigh irrefragable proof." *Trans-Atlantic Industries, Inc.*, GSBCA No. 10803, 91-1 BCA ¶ 23,412.

The Program Office finally argues that the considerations of balancing the harms and public policy concerns weigh in favor of allowing performance of the disputed task orders. Specifically, the Program Office states that no other satisfactory contract vehicle is available for supporting the four tasks at issue, because no other satisfactory contract vehicle is available for performing the work covered by the disputed task orders; and failure to continue uninterrupted support or timely initiation will result in major disruptions to FAA objectives in support of its customers and mission and will result in significant delays and cost impacts to programs. *See Declaration of Dorothy Reimold*. In addition, we take judicial notice of the fact that one of the disputed task orders involves Year 2000-related work, and that such work has been assigned the highest priority by the FAA Administrator.

## **ODRA STANDARD OF REVIEW**

AMS § 3.9.3.2.1.6 provides:

- • The FAA will continue procurement activities and, where applicable, will permit contractor performance (after award) pending resolution of a protest, unless the FAA determines there is a compelling reason to suspend or delay all or part of the procurement activities. For protests after award, the ODR may recommend suspension of contract performance. A decision to suspend or delay activities will be made in writing by the Administrator or his designee.

The AMS governs FAA procurements, as opposed to the procurements of other Federal agencies, which are governed by the Competition in Contracting Act of 1984 ("CICA"), 31 U.S.C. § 3553. The AMS is the result of Congress' direction to the FAA to design a procurement system that meets the unique needs of the agency and provides for more timely and cost-effective acquisitions. *See Weather Experts, Inc.*, FAA Order ODR 97-25; Department of Transportation Appropriations Act of 1996, Pub. L. 104-50, 109 Stat. 436. For the sake of comparison, under CICA, 31 U.S.C. § 3553(c)(2), a protest before award automatically stays contract performance unless the head of the procuring activity authorizes performance upon a written finding that "urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for a decision on the protest." Likewise, under 31 U.S.C. § 3553 (d)(2), when a protest is filed after award, contract performance may also be authorized in writing as being "in the best interests of the United States."

The Administrator's adjudicative authority over protests and contract disputes, which has been delegated to the ODR, derives from a combination of the FAA Organic Statute, 49 U.S.C. § 46101 et seq., the Department of Transportation Appropriations Act of 1996, Pub. L. 104-50, 109 Stat. 436, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. It is appropriate, in this case of first impression, that we turn to the standard for injunctive relief under the Administrative Procedure Act and the cases interpreting it, to guide our interpretation of "compelling reasons" under AMS § 3.9.3.2.1.6. In determining whether a preliminary injunction should be granted under the APA, the moving party must demonstrate (a) a likelihood that it will prevail on the merits; (b) that it will suffer irreparable injury if the injunction is not granted; (c) that the injunction will not cause substantial harm to other persons interested in the proceedings; and (d) that it is in the public interest (or at least not adverse to the public interest). *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

When the second, third and fourth of the above factors strongly favor interim relief, a court in its discretion may grant a stay if the movant has made a substantial case on the merits. "The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed ... may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors." *Id.* at 843. "[I]t will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Id.* citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953).

In reviewing whether "compelling reasons" exist to recommend a stay, it is neither necessary, nor in our view provident, to prejudge whether a protester has a probability of success on the basis of initial pleadings. This is particularly true in a bid protest context, where the stay issue will often be litigated before the agency report is filed. The protest document itself may be the only substantive pleading in the record. Indeed, as the Court

in *Washington Metropolitan* noted, a "weakness of adherence to a strict 'probability' requirement is that it leads to an exaggeratedly refined analysis of the merits at an early stage in the litigation." *Washington Metropolitan, supra* at 844. The ODRA standard for suspension shall be determined on a case-by-case basis by looking at a combination of factors including: (1) whether the protester made out a substantial case; (2) whether a stay or lack of stay is likely to cause irreparable injury to any party; (3) the relative hardships on the parties; and (4) the public interest. Greater emphasis will be placed on the second, third and fourth prongs of the analysis. This approach is consistent with that of the Court of Appeals for the District of Columbia Circuit, and provides for a flexible analysis "under which the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors." *Id.*

## DISCUSSION

Crown's protest makes out a substantial case, based on specific facts and law, that provide "a fair ground for litigation and thus for more deliberative investigation." *Washington Metropolitan, supra* at 844. Crown has not demonstrated, however, that it will be irreparably harmed if a stay of the four task orders at issue is not granted. Crown claims it suffers irreparable harm as a result of the loss of valuable employees to UNITECH and loses a competitive advantage to UNITECH as a result of a destabilized workforce, thus depriving it of a fair opportunity to compete in a recompetition.

The ODRA is not persuaded that the loss of "valuable employees" to UNITECH constitutes "irreparable harm" in this instance. The Court of Appeals for the D.C. Circuit has found:

Only economic loss that threatens the survival of a movant's business constitutes irreparable harm. [*Citations Omitted*]. The plaintiffs do not claim that they will be destroyed if they do not obtain an injunction. Rather, they merely claim that they risk losing a valuable contract and some of their employees. This is insufficient. Plaintiffs have failed to demonstrate irreparable injury.

*Foundation Health Federal Services v. United States*, 1993 U.S. Dist. LEXIS 20069 (D.D.C. 1993). Crown's claim of injury does not rise to such a level. Furthermore, the Program Office has voluntarily agreed to suspend 97% of the contract. In addition, a stay of the four task orders at issue would not necessarily result in the return of Crown's valuable employees or re-stabilization of its workforce, *i.e.* a return to the status quo. And, a stay would not prohibit UNITECH from hiring whatever employees it wishes.

There are no guarantees for competing companies that valuable employees will not want to change employment. Employees are not possessions of their employers and may naturally follow the work and their own professional opportunities. Thus, if Crown's protest is successful and if it ultimately is awarded the contract, Crown may be in a

position to rehire lost employees. Under the circumstances here, the ODRA does not view the loss or potential loss of employees to constitute "irreparable harm" to Crown, but rather to be simply the "usual distress of a disappointed bidder." *TEAC America, Inc. v. United States*, 876 F. Supp. 289, 294 (D.C. 1995) *citing DOD Contracts, Inc. v. United States*, 1987 U.S. Dist. LEXIS 16140, No. 87-2970, (D.D.C. December 1, 1987)(Gesell, J.).

Crown further contends that the FAA will not be harmed by a suspension and can satisfy all its immediate requirements through Crown's incumbent contract. The Program Office responds by arguing that:

[n]o other satisfactory contract vehicle is available under which to perform these taskings at this time. A contract with Crown ... was considered as it is an ongoing contract however it did not serve to support these taskings for the following reasons:

- a. The contract does not currently support all of the identified taskings (no ongoing activity in FIS/TIS, Y2K, and very limited effort in CPDLC).
- b. The FAA would need to exercise another option year which would preclude the opportunity to issue orders under the new contract.
- c. A transition effort has already been initiated for the CPDLC tasking and the Administrative tasking. Another transition effort would be required.
- d. Where possible, orders for the new contract (DTFA01-98-C-00081) have been designed to augment services currently provided by the Crown contract.

The Program Office basically contends that to grant the stay and require the FAA to meet its needs from its contract with Crown would deprive the FAA of the services available under the task orders with UNITECH, which contain Statements of Work that are more comprehensive than those in Crown's contract. To grant the stay and require the FAA to meet its needs with Crown also would cause an additional transition effort subjecting the FAA to more transition costs.

The Program Office further states that the harm to the FAA resulting from a suspension of the four task orders would be:

major disruptions to the FAA's objectives in support of its customers and mission and will result in significant delays and cost impacts to programs. The CPDLC tasking is ... critical to the National Airspace System modernization effort and to the Free flight Phase I Program. The FIS/TIS

tasking is in support of a program which the FAA Administrator ... [agreed to implement] in 1998. ... The Year 2000 tasking is critical to meeting the FAA's objective to ensure continued supportability of our systems on time before the millenium. The Administrative tasking allows for the support contractor to establish a Program Manager for these taskings in addition to establishing critical business management support functions in support of the ADL Product Team.

*Declaration of Dorothy Reimold, paragraph 4.*

Although these harms are stated in general terms, it is obvious that major disruption to efforts involving the National Airspace System modernization, Flight Information Services, Year 2000, and the Administrative tasking (which supports all these programs) adversely impacts the FAA's ability to accomplish its mission on a broad scale.

Finally, the public interest would not be served if the ODRA suspends performance of the four task orders. Taxpayers would be responsible for bearing additional expenses incurred by the FAA in paying both Crown and UNITECH, pending a decision by the Administrator on the merits. Also, in the most general sense, a suspension would delay the FAA's achieving its mission objective, which ultimately is to provide a safe, secure, and efficient global aerospace system. In balancing these harms, the ODRA concludes that Crown's harms resulting from the performance of the four task orders are outweighed by the harms which the FAA, the public and UNITECH would suffer from the requested stay of task order performance.

## **CONCLUSION**

For the foregoing reasons, the ODRA will not recommend that the FAA Administrator stay the four subject task orders. Pursuant to its authority under the Administrator's delegation of July 29, 1998, and for the reasons set forth above, the ODRA denies the suspension request relative to (1) Administrative Support Services; (2) Controller Pilot Data Link Communications Support ("CPDLC"); (3) Flight Information Services (FIS)/Traffic Information Services; and (4) Year 2000 work.

\_\_\_\_\_/s/\_\_\_\_\_  
Marie A. Collins, Dispute Resolution Officer  
For the FAA Office of Dispute Resolution for Acquisition

Date: October 9, 1998